INDEX

CITATIONS

Cases:

582648—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 812

AMERICAN STORES, INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia. The opinion of the Municipal Court of Appeals for the District of Columbia is reported in 32 A. (2d) 388 (R. 7–13). The opinion of the United States Court of Appeals for the District of Columbia is reported in 139 F. (2d) 377 (R. 17–20).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered December 13, 1943 (R. 21). A petition for rehearing (R. 22–31) was denied January 3, 1944 (R. 31). The petition for a writ of certiorari was filed in this Court on March 23, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in a consumer's action for statutory damages for a price overcharge, pursuant to Section 205 (e) of the Emergency Price Control Act, the damages awarded must be in the amount of $50 or treble the amount of the overcharge, whichever is the greater, or whether, as petitioner contends, the statute reserves discretion to the trial court to award a lesser judgment.

STATUTE AND REGULATION INVOLVED

This case involves the Emergency Price Control Act of 1942 (Act of Jan. 30, 1942, 56 Stat. 23, 50 U. S. C. App., Supp. II, Sec. 901) and the General Maximum Price Regulation (7 F. R. 3153) issued thereunder.

Section 205 (e) of the Act, under which this suit was brought, provides as follows:

> If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

Section 4 (a) of the Act, which sets forth the pertinent statutory prohibitions, reads as follows:

It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered

> into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

The General Maximum Price Regulation issued under Section 2 of the Emergency Price Control Act on April 30, 1942 (7 F. R. 3153) provides in pertinent part as follows:

> § 1 *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:
>
> (a) No "person" shall "sell" or deliver any "commodity" * * * at a price higher than the maximum price permitted by this General Maximum Price Regulation * * *.
>
> § 2 *Maximum prices for commodities and services: general provisions.* Except as otherwise provided in this General Maximum Price Regulation, the "sellers" maximum price for any commodity or service shall be: "(a) The highest price charged by the seller during March, 1942.

STATEMENT

The petitioner operates numerous self-service grocery stores throughout the District of Columbia. This suit arose out of a sale of a can of Campbell's Soup to Miss Josephine McCorry by one of petitioner's stores located at 17th & Corcoran Sts., NW., Washington, D. C. (R. 4). The purchaser, on November 19, 1942, filed suit in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia to recover the sum of $50 from the petitioner pursuant to Section 205 (e) of the Emergency Price Control Act for an alleged overcharge in the sale of the can of soup (R. 2). Prior to trial, the respondent Administrator was granted leave to intervene as intervenor-applicant in support of the action (R. 1).[1]

The trial of the case was held on March 13, 1943. The plaintiff and a corroboratory witness proved that on November 14, 1942, petitioner sold plaintiff a can of soup for 14¢, the price marked on the top of the can (R. 2–4). The uncontradicted evidence further established that the maximum price for such commodity established by the General Maximum Price Regulation was 10¢ (R. 2).

[1] As provided by Rule 30 of the Municipal Court of Appeals for the District of Columbia, the record of the proceedings before the trial court consists solely of the application for appeal to the Municipal Court of Appeals (R. 1) and the objections thereto (R. 3), as certified by the court (R. 1).

The petitioner introduced evidence to the effect that about a month prior to the sale in question the Campbell's Soup Company had begun distribution of a new can of soup on which the retail ceiling price was 14¢ (R. 4); that the "new" and "old" style soups were kept on the same shelf; and that any improper marking on the can in question was due to a mistake (R. 4). The record contains no evidence of an intent to violate the price ceiling on the part of the petitioner.[2]

The Small Claims Court found that there had been a sale at 14¢, that the maximum price was 10¢ and that such a sale constituted a violation of the Act (R. 2). The court stated that the duty rested on the store manager to see that the merchandise was correctly marked (R. 5). Nevertheless the court held that it had discretion under the statute to determine the amount of the damages in the light of the evidence before it. Over the objection of the plaintiff and the Administrator, the court awarded plaintiff $5 rather than the $50 recovery for which plaintiff had prayed pursuant to Section 205 (e) of the Act (R. 2, 4).

The Administrator applied to the Municipal Court of Appeals for the District of Columbia for the allowance of an appeal, urging the importance of the question in the enforcement of the Act (R. 1). The application was granted on

[2] But see pp. 11–12, *infra*.

March 24, 1943 (R. 6). On June 8, 1943, the Municipal Court of Appeals affirmed the judgment of the lower court, one judge dissenting (R. 7–14).

The Administrator applied to the United States Court of Appeals for the District of Columbia for the allowance of an appeal from this decision, which was granted on August 16, 1943 (R. A.). On December 13, 1943, the Court of Appeals unanimously reversed the decision of the Municipal Court of Appeals, holding that where a violation of the Act and the Regulation has been shown, the trial court is without discretion to vary the minimum statutory damages but must enter judgment for the statutory amount of $50 or treble the overcharge, whichever may be the greater (R. 17–21).[3] Petitioner's motion for a rehearing (R. 22) was denied (R. 31).

ARGUMENT

1. Petitioner did not at any stage of the proceedings take an appeal from the judgment against it in the amount of five dollars. The only question properly presented by the petition for certiorari is the question argued before the court below and decided by it: whether the trial court had

[3] By stipulation filed December 10, 1943, and approved by the United States Court of Appeals on December 14, 1943, Chester Bowles, Administrator of the Office of Price Administration was substituted for Prentiss M. Brown, as appellant (R. 15–16).

discretion to enter judgment for the plaintiff in an amount less than fifty dollars. The court below thus defined the issue (R. 18–19):[4]

> Neither appellee nor the Municipal Court of Appeals suggests that inadvertence is a defense or that appellee has any defense. On the contrary, the court says and appellee does not deny that the judgment against appellee was proper.
>
> The only question in dispute is whether the judgment should have been for $5 or $50. The position of appellee and of the Municipal Court of Appeals appears to be that the Act confers upon the trial court discretion to award the statutory sum of $50 or not to award it, as the court may think reasonable in the light of equitable considerations of fairness and policy. We think that position untenable.

The opinion observes that the language of Section 205 (e) unequivocally provides for a minimum recovery of $50 or treble the overcharge, "whichever is the greater" (R. 18, 19). The opinion also points out that Section 205 (e), as

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[4] The standing of the Administrator, who intervened in the Municipal Court, to take an appeal has not been challenged, though the point was noticed by the Municipal Court of Appeals (R. 8, n. 4) and by the court below (R. 18). The action of these courts in upholding the right to appeal would seem to establish that right as a matter of local statutory procedure. There remains, of course, a possible question whether a controversy exists within the meaning of Article III of the Constitution. It is believed, however, that such a question need not be considered in this case, in view of the

contrasted with the penal provision of Section 205 (b) which expressly applies only against persons who "willfully" violate, contains no comparable language that may be taken as an indication of a Congressional intent to restrict the consumer's remedy exclusively to cases of intentional violation (R. 18). The opinion fully reviews the pertinent legislative history (R. 19), which is unusually specific and compelling. Finally, the Court of Appeals has forcefully stated the paramount considerations of wartime policy which dictated the enactment of Section 205 (e) in its present form—the need to supplement the necessarily limited enforcement facilities of the Government with aid from consumers and tenants; and, in order to ensure and encourage such consumer participation in enforcement, the need to frame the statute in such a way as to hold out to the consumer the incentive of substantial recovery and simplified courtroom procedure (R. 19, 20). No professional enforcement staff of rea-

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legislative character of the Municipal Court and the Municipal Court of Appeals, and the dual character of the Court of Appeals for the District of Columbia (see *O'Donoghue* v. *United States*, 289 U. S. 516, 550–551). The constitutional question would relate only to the power of this Court to review the decision on certiorari. Cf. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. If the present case is not otherwise worthy of review, it is believed that the question of this Court's power of review would not in itself warrant the granting of certiorari to determine whether a controversy in the constitutional sense exists.

sonable size could hope to police the millions of daily retail and rental transactions which are subject to control under the present Act. The indispensable participation of consumers and tenants in enforcement would be discouraged if these persons faced difficult tasks of proof as to scienter in statutory damage actions, and if they had to contend with the gamble of an indeterminate recovery.

The Court of Appeals, in its analysis of the statutory language, might have added that the closing sentence of Section 205 (e) ("The provisions of this subsection shall not take effect until the expiration of six months from the date of enactment of this Act.") is a plain and compelling indication that Congress appreciated that this enforcement remedy was necessarily rigorous and consequently provided that sellers should have a reasonable initial period in which to accustom themselves to the new program of controls before being subjected to the absolute statutory liability established by Section 205 (e). Doubtless the Court of Appeals felt it unnecessary to elaborate further upon the related issues of absolute liability and unintentional violation in view of petitioner's willingness below to concede these issues, insofar as they bear on the fundamental question whether an action under Section 205 (e) lies against an unintentional violator (R. 18). Statutory remedies establishing liability without fault

in the public interest have often been upheld by this Court. E. g., *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57; *United States* v. *Balint,* 258 U. S. 250; *Overnight Transportation Co.* v. *Missel,* 316 U. S. 572. While the present provision, as held below, is remedial (R. 20), it is to be observed that statutes of this type providing for multiple recoveries have been approved irrespective of their characterization as penal (*Minneapolis & St. Louis Ry. Co.* v. *Beckwith,* 129 U. S. 26), or remedial (*Overnight Transportation Co.* v. *Missel,* supra).

2. Petitioner seeks to raise the question whether Section 205 (e) is in any event applicable to an "innocent overcharge" (Pet. 6–14). While that question is an important one in the administration of the Act, it is submitted that the present case does not afford a proper occasion for its decision. As already noted, no appeal was taken by petitioner to the Municipal Court of Appeals or to the Court of Appeals for the District of Columbia. Thus no attack was made by petitioner on the judgment granting damages in the amount of $5. While it is true, as petitioner argues (Pet. 6, n. 3), that an appellee may support a judgment on grounds rejected by the lower court, that principle is not applicable here. Aside from the fact that the contention here made was not raised below, the record is not adequate for its consideration. The record consists only of the

appellant's application for appeal and the appellee's objections thereto, as certified by the Municipal Court (see note 1, *supra*). Since petitioner took no appeal, there was no occasion for the Administrator to include in the statement on appeal facts which would bear on the character of the petitioner's admitted violation of the regulation; the issue was limited to the power of the trial court to award damages in an amount less than the statutory minimum. In fact, there was evidence at the trial, not included in the statement on appeal, showing that about one week prior to the transaction giving rise to this suit, the plaintiff purchased the identical article in the same store and pointed out to the manager that the can was marked 14 cents instead of 10 cents, whereupon she was charged 10 cents. The evidence also showed that on this occasion plaintiff warned an employee that the cans of new and old style soup were commingled on the shelf, and advised that these cans should be segregated to avoid confusion and to aid in proper observance of price ceilings. This incident is particularly significant in view of petitioner's strong insistence at this time (Pet. 9–11, 22–24) that Section 205 (e) should be construed as inapplicable to cases where the purchaser has not called the overcharge to the attention of the seller and thus given the seller an opportunity to correct any "error". We do not suggest that petitioner's contention is sound as a

matter of law. We maintain only that petitioner is not entitled to secure a ruling on it in view of the state of the record.

3. The decision of the Court of Appeals is not in conflict with the decision of any appellate court. The decisions of all district courts [5] and of all but a very small number of state courts [6] which have passed upon the issue are in accord. The issue in this case, since it does not involve any statutory restriction upon the equity powers of the courts, but instead turns on the scope of a statutory cause of action at law, is distinct from the issues recently determined by the Court in *The Hecht Co.* v. *Bowles,* No. 316, present Term.

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[5] *Brown* v. *Cummins Distilleries Corp.*, 53 F. Supp. 650 (W. D. Ky. 1944); *Brown* v. *Griffin Grocery Co.* (E. D. Okla. 1944), OPA Service 620:419; *Bowles* v. *Vinson* (D. N. Mex. 1943), OPA Service 620:312; *Bowles* v. *National Erie Corp.* (W. D. Pa. 1944), not yet reported; *Bowles* v. *Augustine* (N. D. Cal. 1944), not yet reported; *Bowles* v. *Rainbow Cleaners & Dyers* (D. D. C. 1944), not yet reported. But see *Brown* v. *Ciffo* (S. D. N. Y.), not yet reported.

[6] *Zwang* v. *A. & P. Food Stores* (N. Y. S. Ct., App. Term, 1st Dept. 1944), OPA Service 620:438; *Barden* v. *Mills* (Mun. Ct., Macon, Ga., 1943), OPA Service 622:287; *Maitland* v. *Krieger* (Ct. Com. Pleas, Essex Cy., N. J., 1944), OPA Service 622:340; *Lewandowski* v. *Mirecki* (Civ. Ct., Milwaukee, Wisc., 1944), not yet reported; *Hogge* v. *Davis* (Ct. of Law and Equity, Richmond, Va., 1944), not yet reported; and *Stotts* v. *Ohler* (Cy. Ct. Denver, Colo., 1944), not yet reported. *Contra: Terry* v. *Eppley Hotels* (Mun. Ct. Lincoln, Neb., 1943) not yet reported; *Gelmini* v. *Ducki* (Ct. Comm. Pl., Conn., 1943), not yet reported.

CONCLUSION

The decision of the Court of Appeals is correct and there is no conflict with decisions of other appellate courts. In view of the state of the record, we feel impelled to oppose the petition.

Respectfully submitted,

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